THE

POWER and PRIVILEGE OF JURIES ASSERTED:

In Opposition to the *Willfully Blind*, and *Malitious Humour* of some *Ill* and *Uncharitable* MEN.

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REASONS why the Court can neither *Fine* or *Impriſon* JURIES, &c. for Delivering a *Verdict* according to *Law* and *Their own Conſciences.*

BEcauſe ſuch Commitment being without Proceſs and Judicial Trial is againſt Law (*viz.*) *Magna Charta*, and the Stat. of 28 *Edw.* 3. *Whereby it is Enacted, That no man in what Eſtate or Condition ſoever he be, ſhall be put out of his Lands or Tenements, nor taken, nor impriſoned, nor diſinherited without being brought in to anſwer by due Proceſs of Law*; and by another Stat. 42. Edw. 3, *That no man be put to Anſwer without Preſentment before Juſtices, or matter of Record, or by due Proceſs and Writ Original according to the Law of the Land, and if any thing be done to the contrary it ſhall be void in Law, and holden for Error and againſt the Petition of Right*, 3 Car. 1.

Tis againſt the very Inſtitution and intent of JURIES, For,

1. They are to be in number 12 at leaſt.
2. For quality *liberi & legales homines.*
3. They muſt be men of Subſtance and Eſtate.
4. They muſt be ſummoned out of the Neighbourhood, where the Fact was done, as moſt knowing of the Fact and all the Circumſtances thereof.
5. They are ſworn to find according to the Evidence.
6. They may be challenged both to the Poll and to the Array: at laſt when they are fitted for their work they are upon Record ſaid to be *Electi, triati & jurati.*

Now all this caution and ſolemnity is uſed, becauſe the Law hath intruſted them with ſo great a part of the Judicature

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dicature, *viz.* The Trial of the Fact, before the Judg can pronounce Judgment touching the Law ariſing upon that Fact: And therefore the Rule of Law is, *Ad queſtionem juris reſpondent judices, ad queſtionem facti reſpondent juratores*, that is, to the queſtion of Law the Judges give their Anſwer, to the queſtion of Fact the Jury give their Anſwer: ſuch Commitment is manifeſtly abſurd, Becauſe,

1. It overthrows all Juries, and conſequently all the ſolemnity in preparing them, as aforeſaid.

2. It ingroſſes and reſolves the whole Tryal of the Fact into the breaſt of the Judg, contrary to the very end of Juries: For to what end are Juries, if having done their Duty, the Judg may puniſh them for ſo doing?

3. Tis beſides, if not againſt, his Oath and Authority, as he is Judg, both which are to diſpence the Laws equally and indifferently according to the beſt of his skill and knowledg; but not to intermeddle with the Fact: but he that takes upon him the knowledg of the Fact without Authority, and thereupon pronounces the Law, cannot be ſaid to diſpenſe the Law, but to exerciſe his own Will. In like manner, where Judgment is that a man ſhall be hanged, and the Sheriff beheads him, this is Felony in the Sheriff, although it is lawful for him to put him to death: ſo in the principal Caſe, although if the Fact were true, and the Judges Judgment would have been according to Law; yet becauſe the ſame Fact might not have been true, and the Judg hath no Authority therein to deal, it follows that his Judgment is Erroneous, for according to the general Rule of Reaſon, *ſublato antecedenti tollitur conſequens*, the Tryal of the Fact being a neceſſary Antecedent to the Judgment of the Law.

4. It puts *Juries* upon theſe *Dilemma*'s either to ſerve or not to ſerve, if they refuſe to ſerve, they loſe Iſſues, and are puniſhed that way: if they do ſerve, then they muſt find according to their Conſciences or not: if accor-

ding to their Conſciences, then they offend the Judg, if it be againſt his Direction, and ſuch Evidence as ſeems ſo to him, and ſo they incur *Fine*, *Impriſonment*, and conſequently Death, Temporal Puniſhments: If not according to their Conſciences, then they offend God, and incur Puniſhments both Temporal and Eternal.

5. Again *Furies* are as antient as *Judges*, and therefore the ſame Law that ordained both *Judges* and *Furies* gave them *diviſum imperium*, a divided Authority, and therefore whoſoever takes away the Authority of *Furies*, takes away the Authority of the *Judge*, I mean the regular and legal Authority, and beſides equality in point of Antiquity, there are other very conſiderable Parallels between them; For if the Judges are ſworn, ſo are the *Furies*; if the *Judges* are conſtituted by Patent, the Jury are conſtituted by Writ; If the Judges are to adminiſter the Law truly and ſincerely; the *Fury* are to find the Fact truly and ſincerely; Now if the *Judge* give in an Erroneous or falſe judgment, yet ſhall not be queſtioned nor puniſhed, if he proceed according to his Conſcience; by the ſame reaſon ought not the *Fury* to be puniſhed, when nothing of corruption or undue practice can be charged on them; ſo that if it be abſurd to puniſh the one, its alſo abſurd to puniſh the other.

6. Where a *Fury* can be charged with any undue or ſiniſter matter, as by taking Bribes, or ſuffering themſelves to be laboured with, the Law hath provided proper puniſhments for them; but the Law hath provided no puniſhments, where a *Fury* proceed according to their Conſcience, and therefore what they do therein is without breach of any Law.

7. It is abſurd in reſpect of it's oppoſition to the general Rules of the Law of God, for it is ſaid, God accepts a man not according to what he hath not, but according to what he hath: But in this caſe, if the Judge ſhould puniſh

puniſh the Jury, a Jury-man is bound to bring in his Verdict not according to what he hath (*viz.*) in point of knowledge or belief, but according to what he hath not (*viz.*) by the direction and ſuggeſtion of another *Sc.* the Judge; although it be againſt his own knowledge or belief.

8. 'Tis contrary to this Rule, Whatſoever is not of Faith, is Sin: now if a Jury bring in a Verdict according to the direction of the Court, but contrary to their own Judgments and Conſciences; then this doing of theirs is not of faith, in as much as they do not believe it and conſequently it is Sin. 'Tis contrary to this Rule alſo, *Thou ſhalt ſwear in Judgment, Righteouſneſs and Truth.* Now forasmuch as the Verdict of the Jury is an effect of their Oath, it follows that it ought to have all thoſe Concomitants, that is, it ought to be in Judgment, to wit, according to the Judgment of him that ſwears, for another mans Judgment as ſuch can not be his; it ought to be in *Righteouſneſs* void of all *Partiallity* and *Paſſion*, and ſo not to be biaſſed by fear of the mighty, no not of any Judges direction; nor by pitty of the poor: It ought to be *Truth*, that is, in *Truth* towards themſelves, to wit, in Conformity and Agreement to their own Conſciences, in truth to the Priſoner, without Falſhood or Diſſimulation, in truth to the Fact, without Perverting, Adding, or Diminiſhing; So that if but a part of the Fact requiſite to make a Guilt be proved, the Jury ought by no means to find the whole fact, for that were to deal falſely contrary to their Oaths.

9. 'Tis contrary to that univerſal principal of Reaſon and Juſtice, of doing to one another as a man would be done unto, and *e contra*; but for a Judge to compel a Jury being upon their Oathes to find according to his direction, and what he calls Evidence, is all one as if another Authority Superiour or Coordinate with the Judg, ſhould

ſhould by puniſhment compel him being upon his Oath to pronounce the law according to the ſence of that Authority, and not according to his own Conſcience and beſt underſtanding, which I ſuppoſe no Judge will be willing to take for Law or Reaſon; why then ſhould he put that in practice, which himſelf diſalloweth in another? and therefore as he himſelf would be free in reſpect of his Oath, ſo ought the Jury to have the like freedom in reſpect of their Oaths: And from this general Rule of Nature, proceeds another Secondary Notion or Rule, *Par in Parem non habet Potestatem*, perfectly applicable in this Caſe, for although in ſome other reſpects there is a great diſparity between the Judge and the Jury, and principally in the Education, Learning and Grandeur of the one, and the middle State of the other, *&c.* Yet in this caſe, as to the very point of acquitting the guiltleſs and condemning the guilty, they ſeem to me perfectly equal, and no *Magis* or *Minus* between them, but Coadjuvant and Co-working cauſes in bringing forth that great effect, Juſtice.

10. Becauſe the act of the one (*to wit*) the Judg is conſequent to the Act of the other; ſo if the one do nothing, the other can do nothing; and as to the Judges direction, Tis no more than a direction which no doubt every Diſcreet and Sober Jury ought diligently to liſten to for their information, becauſe of the learning and ability in the Judge, to methodize and open what perhaps hath been confuſedly and obſcurely delivered by the witneſſes: But if it exceed the bounds of a direction, and becomes cloathed with the rough Garment of compulſion, it will ſeem then to degenerate from its own Nature, and firſt Reaſon and Inſtitution.

11. Moreover the Juries are Tryers, that is, are ſole Judges of the fact, appears from hence, becauſe the trial by the Jury is a trial by it ſelf diſtinct from, and contradi-

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diſtinguiſhed to other trials inſtituted by law; for there are tryals (1.) By Battle, an ancient manner of Tryal upon a Writ of Right, (2.) By inſpection of the Court upon a writ of Errour to reverſe a Fine acknowledged by an infant (3.) By the Ordinaries certificate upon a Writ of Dower, where the Tenant pleads the woman was not lawfully married to her dead Husband (4.) By witneſſes before the Juſtices upon a writ of Dower, if the tenant plead the Husband be alive it ſhall be tryed by witneſſes (5.) By the Country, that is, Juries as in the caſe in queſtion. Now if a tryal by a Jury be diſtinct from a tryal by witneſſes; then it is not the ſame: Whereas if the Jury were compellable to find according to the Saying or Swearing of the witneſſes, then it will be clearly the ſame, that is, a tryal by witneſſes, and conſequently the having of a Jury would be but troubleſom, dilatory and impertinent, becauſe the Judge in reſpect of his own Skill and Learning, can both better examine and underſtand their teſtimony than Juries, who are for the moſt part *Gentlemen*. Now if a tryal by a Jury and a tryal by witneſſes be ſeveral things, then is not a Jury compellable by the Judge to give their Verdict, no not according to the teſtimony of the witneſſes, for they may be *Corrupt*, *Partial*, *Infamous* or otherwiſe *Unmeet*, which is referred to the Judgment of the Jury, who where ſuppoſed to be Cognizant of them, becauſe they are of the neighbourhood, and is not referred to the Judge who may well be ſuppoſed to be ignorant of thoſe circumſtances and conditions of witneſſes and parties, *&c.* And certainly it was the great wiſdom of Antiquity, not to intruſt the adminiſtration of Law, to the breaſt of one or a few great men alone, though never ſo Sincere or Learned, without the concurrence of a conſiderable number of the body of the people, which are the Jury. But of this there will be occaſion to ſpeak when it ſhall be ſhewn what is meant

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by the word *Evidence*, neither is it superfluous to consider that this tryal by a Jury in Criminal Causes, said to be a tryal by God and the Country; which seems to Imply the absoluteness of it. So that the acquittal by the Country is an acquittal by God, and a finding Guilty by the Country, a finding Guilty by God.

12. Again if Juries be compellable by a Judge to give their verdict as aforesaid, in vain are those Eulogiums and Praises every where resounding concerning Juries both in Law, History, and Policy of our English Nation: In vain doth that learned and Sincere Judg *Fortescue* place the most principal parts of the commendations of the Laws of England, in tryals by a Jury, above and beyond the tryals by witnesses in the Civil Law. Whereas if this in question be admitted, That Juries may be fined by the Judg as aforesaid, then is this tryal by a Jury far worse than by witnesses, in the Civil Law; Because that kind of tryal is not *viva voce*, but by examination upon Interrogatories by Officers appointed in that behalf, which examination is taken in writing of every witness apart, and several, the one not knowing what the other hath said, and so remains upon record to posterity, and then the Plantiff or Defendant may cross examine each others witnesses, and that leisurely with deliberation for bolting out the truth, and discovery of falshood and contradiction. Whereas in our Case the witnesses are examined *viva voce*, upon a suddain altogether: So that there can be neither such sifting them, nor if they forswear themselves by contradictions, can it be so well observed or remembred, for *vox audita perit* and so remains not to posterity to take notice of: In like cases, shall it therefore be thought reasonable that mens Lives, Liberties, and Estates should be bound up in so narrow and dangerous a Compass, as the direction of a Judg against Evidence seeming so to him? Moreover in vain doth Sir

Thomas

Thomas Smith cries up the peaceable and happy policy of this Kingdom, by that one thing of Juries, wherein no man if he be condemned can blame the King or the Nobles, or the Judges, or the Men of Power, the frequent objects of envy, but his own Peers, and ſo every man reſts content, and the Government ſecured. In vain alſo may the Priſoner at the Bar in Capital Cauſes, challenge peremptorily 35 Jurours; without ſhewing cauſe. If when the next Jury, which is ſuppoſed to be moſt indifferent for the Priſoner, ſhall be compellable to give their verdict according to the Judges direction and what he calls evidence.

But doubtleſs all this defence for Juries needs not, if there was no colour or pretence of reaſon for the ſaid Fine and Commitment. 'Tis ſaid therefore, that there are ſeveral Precedents and Caſes in Law, whereby it appears that Judges in criminal cauſes, have Fined and Impriſoned Juries for not finding according to evidence. For anſwer; To find againſt Evidence, is manifeſtly unlawful; for that is to Fine againſt conſcience, and to ſpeak with the mouth, what is not believed in the heart. What therefore in Natural and Rational ſignification, Evidence is, and what that word means, is the queſtion.

1. By what hath been ſaid it ſhould ſeem in general, that that is no Evidence (that is, binding Evidence) which only ſeems ſo to the Judge; for if it were, then whether it ſeem ſo to the Jury or not, they would be bound to find according thereunto, contrary to the reaſons aforeſaid.

2. Nor is it what ſeems ſo to the people (*viz.*) the Spectators, or Standers by in Court; for they have no ſhare in the adminiſtration at all.

3 It follows then, It is what ever appears to the Jury, to be neceſſary to inform their Conſciences and Judgments, concerning the truth of what is inquirable before them.

And that this is ſo, appears from hence, becauſe admitting

mitting in an indictment of Robbery, Evidence be that the Prisoner such a day and at such an hour of the day, and at such a place, did rob a man, and one of the Jury knows the Prisoner, who perhaps is his neighbour: he knows also that the same day, and at the same hour of the day, the Prisoner was at another place, perhaps in his own company upon such or such an occasion. The question is, whether the Ju or shall proceed according to his evidence, *Id est*, his own knowledge, or according to the external evidence or swearing of the witnesses. I suppose it will be answered, According o his own kuowledge, and is it not likely that a Jury will, nay ought they not to be sooner moved with the Evidence of one of their fellows, than the Evidence of a stranger. If so? shall they be punished afterwards for their verdict thereupon?

'Tis true the Judges doe use to determine the pertinency of Evidence that is, whether this or that thing be necessary and meet to be shown to the Jury, and therefore in civil causes either party may Demur to the Evidence, and then the Judges rule; whether it shall be made use of or not. But when the Evidence is given, 'Tis still in the conscience of the Jury, what credence they will give to it, otherwise all the absurdities aforespoken of will follow.

And as concerning Precedents, though it be true they ought to be weighed and regarded with great sobriety and humility, and *A communi observantia non est recedendum*, yet none of them ought to be made use of against Reason and the Principles of Justice; nor are they further Argumentative than they are agreeable thereunto; for if it be true, *Uno absurdo dato mille sequuntur*; no reason if when one inconvenient Precedent is formed by reason of some incident circumstances of that particular Case, it be afterwards vouched to warrant another like Case, the nature of man being more ready to embrace Errour and Falshood, rather than Truth and sound Reason. Nor is it rare and strange for later times as they are more or less vertuous and knowing than the former, to differ from and reject the actions and precedents of their Ancestors. Nor can any of those Precedents plead any such Antiquity, as the most ancient and bottomless Custom and Law of Juries, with their Privilege and Authority. Nay, I suppose it will be hard to make them reach beyond the time of *Hen.*8. which perhaps is not beyond the memory of some men living.

Another reason which is objected for punishing Juries, for going against Evidence in Criminal Causes is,

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Becauſe in Civil Cauſes there lies an Attaint, but in theſe Caſes none: and therefore if a Jury ſhould not be puniſhed, there would be no remedy, but perſons manifeſtly guilty might be acquitted, to the great hurt and damage of the King and Kingdom. As touching the Non-remedy enough hath been ſpoken before, and more may be ſaid; for in all States and Governments the Adminiſtration of the Law muſt be intruſted ſomewhere, and there muſt be a *Ne plus ultra* in all Controverſie whatſoever, for *Intereſt reipublicæ ut ſit finis litium.* Now the Law hath prudently and carefully lodged that Truſt by way of diſtribution between the Judge and Jury, as is ſaid before; and if they do not their duty, it may be ſaid in ſuch caſe as a moſt Divine Author doth in ſuch a like, *If the light within thee be darkneſs, how great is that darkneſs!* As touching the Damage ariſing by Acquittal, there is little reaſon to infer a Spring from one or two Swallows; that is, to conclude becauſe one or two Juries in an Age are miſtaken, that therefore they will univerſally ſo do, I ſay there is little reaſon ſo to think.

1. Not to reiterate any thing before ſpoken, becauſe Juries are or ought not to be ſtanding but ſucceſſive.

2. It is or rationally ſhould be chiefly their care to prevent it, becauſe perſons of their condition are moſt obnoxious to the prejudice proceeding from the Impunity, when perſons of greater Rank are perhaps better guarded, and ſo exempted from ſuch danger. And if the Offence be of an Epidemical nature ſtriking at the State, they alſo will have a greater ſhare *pro ratione mali*, of the miſchief of the Impunity of any, both in themſelves and their Poſterity. As to the Attaint,

1. The Non-allowance or inſtitution of that in Criminal Cauſes perhaps (and very rationally) might be *in favorem vitæ*, in favour of life, by not drawing a mans Life, Eſtate, and Poſterity in effect, in queſtion twice for the ſame thing. The Law as all good and laudable Laws inclining more to Mercy than Juſtice, and this upon the ſelf ſame reaſon as the ſaid Challenge of 35 is allowed.

2. Becauſe in Criminal Cauſes two Juries paſs upon the priſoner, *viz.* the Grand Jury and the Petty Jury, both of which have their ſeveral Office and Effects; and there the Petty Jury are in lieu of a Jury upon an Attaint, and therefore no reaſon when the Petty Jury hath acquitted him, he ſhould be ſubject to be found guilty by another Jury after, and the Petty Jury puniſhed as in Attaint, for that were to puniſh one Jury after another *in infinitum.*

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3. The Judgment, amongſt other things, upon an Attaint is, that the Party grieved by the firſt Verdict and Judgment, ſhall be reſtored to what he loſt thereby; and therefore if an Attaint ſhould lie in Criminal Cauſes, it ſhould be for the behoof of the Priſoner, that he might be reſtored. On the other ſide, if it doth not lye, the King loſes nothing by it, but the Acquittal by the Petty Jury preſerves the Subject; and certainly, when any thing is doubtful, it is better to preſerve than to deſtroy.

The ſecond General Head, or Reaſon, upon which the Jurors ought to be diſcharged, is for the Erroneouſneſs of the Judgment and Execution by which they ſtand committed.

1. The Fine is one entire Fine of 100 Marks, and impoſed joyntly and ſeverally; ſo that every one is puniſhed for the Offence of the other, contrary to all the Precedents; for though one be willing to pay his proportion, yet ſhall he not be diſcharged till he hath paid the proportions of all the reſt; ſo one ſhall pay all the Fine, and others pay nothing, or elſe he cannot be diſcharged; and this is like to fall upon the weakeſt, both in Perſon and Eſtate, (that is to ſay) that is leſs able to endure impriſonment.

2. Becauſe the *Capiatur* is until they ſhall pay their ſeveral Fines, and there are no ſeveral Fines, but one entire Fine; and ſo the ſence is, that they ſhall be impriſoned until they pay nothing, and then the Commitment is void.

The Reaſon of the Judgment is, becauſe the Jurors gave their Verdict againſt full Evidence, and it doth not particularize the Evidence that was given, whereby it may appear whether it was full or not. Now inaſmuch as the Court which pronounced the Judgment is an Inferiour Court, ſo that a man may Appeal from their Judgment to a Superiour, and there is nothing for the Superiour Court to Judge upon, but the Body of the Record; it follows, if that Record be obſcure, too general, or uncertain, that the Superiour Court cannot give Judgment, and conſequently that the Record is void: for if the queſtion be whether the Evidence was full or not, it muſt either be determined by the Superiour Court, or by the Inferiour Court; if by the Inferiour Court, then the Appeal is in vain; if by the Superiour Court, then there is nothing before them to guide and govern their Judgments, but that very thing which is the cauſe of the Complaint of the Parties grieved, and ſo the Appeal is in vain.

FINIS.